

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

COPPER SANDS HOMEOWNERS  
ASSOCIATION, INC., et al.,  
Plaintiff(s),  
vs.  
COPPER SANDS REALTY, LLC, et al.,  
Defendant(s).  
Case No. 2:10-cv-00510-GMN-NJK  
ORDER  
(Docket No. 643)

Pending before the Court is Defendant Cannon Management's ("Defendant") renewed motion to set aside Plaintiff's assertion of attorney-client privilege. Docket No. 643. Plaintiff filed a response in opposition and Defendant filed a reply. Docket Nos. 647, 648. The motion came on for hearing on February 20, 2014. *See* Docket No. 667. At the hearing, the Court ordered supplemental briefing regarding whether communications between Defendant and Mr. Leach are privileged communications as a threshold matter. The Court hereby **AMENDS** its oral order as follows.

## A. Plaintiff's Timeliness Argument

Plaintiff’s counsel’s primary argument at the hearing was that Defendant failed to raise any attorney-client privilege issue in its initial motion filed in 2012, with the exception of one letter from 2007. Although Plaintiff’s opposition brief notes that point in passing, *see* Docket No. 647 at 3, it failed to develop the argument or cite any legal authority supporting what the Court construes as a timeliness argument as to the other disputed communications. To the extent Plaintiff is indeed asking the Court to limit its ruling to a single letter, it must support that argument with a *detailed* discussion of the previous motion practice and discussion of the relevant case law regarding

1 timeliness of discovery motions.<sup>1</sup> Plaintiff's written support for its timeliness argument must be  
 2 filed no later than March 7, 2014. Defendant's response shall be filed no later than March 14, 2014,  
 3 and any reply from Plaintiff shall be filed no later than March 18, 2014.

4 B. Defendant's Non-Privilege Assertions and Waiver Arguments

5 As the Court noted during the hearing, whether privilege attaches as a threshold matter to the  
 6 various communications between Defendant and Mr. Leach is unclear based on the briefing  
 7 submitted.<sup>2</sup> Defendant's motion asserts without elaboration that: "any communication/advice  
 8 between Plaintiff HOA and Mr. Leach that: (1) Cannon was present for; . . . or; (3) Cannon was  
 9 privy to due to any e-mails, letters, phone calls or subsequent communications should not be covered  
 10 by privilege." See Docket No. 643 at 10. At the hearing, counsel was unable to clarify whether  
 11 privilege attaches to any, all, or only a subset of the communications between Defendant and Mr.  
 12 Leach. Defendant's counsel also asserted that Plaintiff had agreed that certain types of  
 13 communications are not privileged, but it remains unclear which communications the parties have  
 14 agreed are not privileged and/or why Court involvement is necessary as to those communications if  
 15 the parties reached such an agreement.

16 Also at the hearing, the Court attempted to better delineate with counsel the categories of  
 17 communications in dispute. It appears from the hearing that there are eight subsets of disputed  
 18 communications: (1) communications between Defendant and Mr. Leach concerning investigation  
 19 into the reserves; (2) communications between Defendant and Mr. Leach concerning investigation  
 20 into structural deficiencies; (3) communications between Defendant and Mr. Leach concerning board  
 21 elections; (4) communications between Mr. Leach and Plaintiff concerning investigation into the  
 22 reserves; (5) communications between Mr. Leach and Plaintiff concerning investigation into  
 23 structural deficiencies; (6) communications between Mr. Leach and Plaintiff concerning board  
 24 elections; (7) communications leading up to and/or related to a 2007 letter that Defendant concedes

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 26 <sup>1</sup> See, e.g., *Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620 (D. Nev. 1999).

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 28 <sup>2</sup> Presumably, the Court need not analyze whether an "at-issue waiver" occurred for any  
 communications that are not privileged to begin with.

1 is itself privileged; and (8) communications leading up to and/or related to a second 2007 letter, as  
 2 well as that second 2007 letter itself.

3 As an initial matter, the Court notes that it does not appear that a finding of an at-issue  
 4 waiver with respect to one category of communications necessarily requires a finding of an at-issue  
 5 waiver with respect to all otherwise privileged communications. *See, e.g., U-Haul Co. of Nev. v.*  
 6 *Gregory J. Kamer, Ltd.*, 2013 U.S. Dist. Lexis 43340 (D. Nev. Mar. 26, 2013) (finding privilege  
 7 waived for NLRB deposition testimony, but not for subsequent law firm documents). As a result,  
 8 the Court believes the parties should provide argument *separately* addressing each of the categories  
 9 of communications identified above. For each category of communications, the briefing should  
 10 detail (1) whether the attorney-client privilege attaches to such communications in the first place  
 11 and, if so, (2) whether the at-issue waiver doctrine applies such that the communications are  
 12 nonetheless discoverable. Defendant's supplemental brief shall be filed no later than March 7, 2014,  
 13 Plaintiff's responsive brief shall be filed no later than March 14, 2014, and any reply from Defendant  
 14 shall be filed no later than March 18, 2014.<sup>3</sup>

15 IT IS SO ORDERED.

16 DATED: February 20, 2014

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 18 NANCY J. KOPPE  
 19 United States Magistrate Judge

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21 <sup>3</sup> Much of the current briefing relates to whether the at-issue waiver doctrine applies to  
 22 communications necessary to a defense to a claim, rather than as part of a plaintiff's claim itself. The  
 23 supplemental briefing should clearly articulate whether each category of documents will necessarily be  
 24 drawn upon as part of Plaintiff's claim(s) or only as part of Defendant's defense(s). For example, the  
 25 current briefing does not sufficiently articulate why communications disclosing construction defects are  
 26 not necessary for Plaintiff's claim on that point given that Plaintiff affirmatively pled that Defendant  
 27 "fail[ed] to use reasonable care and skill to discover *and disclose* defects in the Subject Property." *See*  
 28 Third Amended Compl. ¶ 161 (Docket No. 154) (emphasis added); *see also id.* (alleging failure to  
 disclose with respect to financial deficiencies). It is not clear from the briefing how Plaintiff can meet its  
 burden of proof on its claim concerning a failure to disclose without putting at issue whether there was  
 actually disclosure vis-a-vis its attorney.